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IN THE

Supreme Court of the United States

October Term, 1965

No. 1003

LOIS BETTY BOUNDY,

Petitioner,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Earl Warren, Chief Justice of the United States and to the Associate Justices of the Supreme Court:

Petitioner, Lois Betty Boundy, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of California to review its judgment, without opinion, denying hearing, thereby affirming the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division 1, which affirmed the judgment of conviction, rendered by a jury, in the Superior Court of the State of California, for the County of Los Angeles.

Opinions Below.

The trial in the Superior Court was by a jury.

The opinion of the District Court of Appeal is Appendix A of the Certified Copy of the Petitions for Hearing in the Supreme Court of the State of California.

Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction of this Court is conferred by 28 U.S.C. 1257(3).

Questions Presented for Review.

1. Where an accused has become the focus of the investigation, taken into police custody, interrogated without being advised effectively or otherwise, of her absolute constitutional right to remain silent or her right to the presence of counsel at every stage of the proceedings and incriminating statements are received which are used against the accused at the time of trial, were the defendant's constitutional rights violated?

2. Where petitioner, after accusation and arrest, was permitted by police to contact counsel by telephone and the police are aware that counsel is in the process of securing petitioner's release, does an interrogation of the petitioner outside the presence of counsel constitute a violation of her constitutional rights?

3. May a waiver of constitutional rights by the defendant be presumed without an express finding by the court?

4. Should *Escobedo v. Illinois*, 378 U.S. 478 (1964), be given retrospective application?

Constitutional Issues Involved.

Involved are the Sixth and Fourteenth Amendments to the United States Constitution.

Statement of the Case.

Defendant, a 60 year old woman, was a bookkeeper, director and treasurer of Dakota Engineering, a California corporation, wholly owned by Frank De Bartolo. She was charged with embezzling approximately $45,000.00 from the corporation during the period May 1, 1962 to April 30, 1963. Receipt of the money was admitted. It was shown that the funds came to her by company check, duly signed by two officers which was deposited to her account in the same bank in which the company had its account. The defense contended that one of the signators was the owner who thereby authorized the transfer of the funds to defendant for his own reasons and his consent was based upon the personal relationship between the parties.

On May 28, 1963, after receiving information from the company accountant and after checking the company and bank records, the police arrested defendant at her apartment [R. T. 287-288]. Statements were taken from the defendant at that time, her apartment was searched, and before being taken to the police station, she was permitted to call counsel by telephone [R. T. 290]. At the police station in Culver City, she was interrogated until counsel arrived with an order for her release several hours later [R. T. 328-358]. During this time,

the officers had obtained approximately two hours of tape recording of questions and answers which was used at the time of trial [R. T. 291-359]. The gist of the recording was an expansion and elaboration of the statements made to the police at the apartment.

The jury found the defendant guilty as charged on October 15, 1963.

An appeal was taken to the District Court of Appeal of the State of California, Second Appellate District, Division 1, on November 12, 1963. Petitioner raised the questions herein posed for the first time in her closing brief, filed November 17, 1964, after the report of the Supreme Court of the State of California in the case of *People v. Dorado,* 61 A.C. 892, 40 Cal. Rptr. 264; first opinion, was filed on August 31, 1964. The District Court affirmed the judgment.

The Supreme Court of the State of California, without opinion, denied a hearing on February 3, 1965.

A remittitur was issued by the District Court on February 9, 1965 affirming the judgment.

ARGUMENT.

I.

Were Defendant's Constitutional Rights Violated at the Time of Arrest?

Defendant relies upon *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758 (1964), in which this court held that the accused was denied "the assistance of counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the states by the Fourteenth Amendment" where the investigation focuses on a particular suspect, the suspect has been taken into police custody, the police interrogation lends itself to eliciting incriminating statements, the suspect requested but was denied an opportunity to consult with his lawyer, and the police have not effectively advised him of his absolute constitutional right to remain silent. Under such circumstances, no statement elicited by the police during the interrogation may be used against him at the trial.

Among the facts in *Escobedo,* which resulted in the above ruling, were the following:

1. Escobedo was arrested and interrogated without making any statement.

2. He had retained an attorney who had obtained his release.

3. He had been re-arrested and while in custody saw his attorney in another room. The attorney waved to and petitioner waved back to the attorney. Petitioner testified that he "took it upon his own to think that the lawyer was telling him not to say any-

thing" and that the lawyer "wanted to talk" to him. He asked for and was denied an opportunity to talk to his lawyer.

4. The petitioner was interrogated outside the presence of his attorney. He was not advised of his absolute right to remain silent. The purpose of the interrogation was to elicit admissions. The petitioner was induced to make statements which were later used against him at the trial.

It may be presumed from petitioner's request for "advice from my lawyer" that the petitioner and his attorney previously discussed the case, and it may be further presumed that petitioner's attorney advised him to make no statement whatsoever (84 S. Ct. at p. 1762, Footnote No. 5). Despite petitioner's understanding of his attorney's admonition and advice and the fact that he did have counsel representing him, this court held that the accused had been denied his constitutional rights.

It is submitted that this case is substantially the same as *Escobedo*. Here, the defendant was the focus of the investigation and had been taken into police custody. She was being interrogated first at her apartment and made incriminating statements which were later used at the time of trial. She had not been advised by the police, effectively or otherwise, of her absolute constitutional right to remain silent or her right to the presence of counsel at all times and at all proceedings. At the time of the first interrogation at the apartment, petitioner had not yet contacted counsel. Thereafter, she was permitted to call counsel by telephone. She was questioned at the station and incrim-

inating statements were elicited. The statements made this second time were an elaboration of what had already been admitted. The recording tapes, transcripts and the officers' testimony were admitted into evidence. These facts bring this case squarely within the proscription of the *Escobedo* case.

II.

Where the Proceedings Are Accusatory and the Police Know That an Accused Is Represented by Counsel, Is an Interrogation of the Accused Outside the Presence of Counsel a Violation of Her Constitutional Rights?

In *Massiah v. United States*, 377 U.S. 210 (1964), the defendant had retained counsel and had already been released on bail. The conviction was reversed as a denial of the basic protections of the Sixth Amendment

> "when there was used against him at his trial evidence of his own incriminating words, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel".

In *Escobedo, supra*, the conviction was reversed because the court admitted into evidence defendant's incriminating statements voiced during defendant's preindictment interrogations in the absence of counsel. The time of the statement, then, is no longer critical. The common element in both cases is the "absence of counsel". Thus, when the proceeding has become accusatory and the agents of the state seek to elicit incriminating statements from an accused, the presence of counsel is essential. Such a statement brings this area of crim-

inal procedure in line with other areas of our law. For example:

1. All substantive procedures are open and are noticed to opposing counsel. All depositions and discovery proceedings are the same way. Here, we are dealing with a far more critical area. The real purpose of the interrogation is not merely discovery but for the purpose of a confession to be used at the time of trial.

2. In civil litigation, it would be a serious breach of ethics for a lawyer representing one side of a case to communicate and question the adverse party without at least notification to the lawyer for the adverse party. This rule should apply with even greater vigor to a criminal case. In *Escobedo,* citing *People v. Donovan,* 13 N.Y. 2d 148, this court approved the following:

   "The court observed that it 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the state, to extract a confession from the accused while his own lawyer, seeking to speak with him was kept from him by the police'." Are not the police merely the investigating arm of the District Attorney's office in these cases? Should the District Attorney be permitted to do indirectly, through police officers, what it would be "incongruous" for him to do directly?

3. The constitutional rights granted by the Sixth Amendment are basic and fundamental. In the abstract, they are meaningless. They are meaningful only when open, obvious and acted upon by all parties, particularly governmental author-

ity. The police should not be permitted to circumvent these basic rights by their own procedures. It should not be assumed that these rights are waived. At the very least, there should be an open hearing in the Trial Court and a finding by the Trial Court that the defendant knew of his rights, was advised of his rights effectively, and intelligently, intentionally and knowingly waived them.

4. An accused is entitled to police protection and the presumption of innocence. The only justification for the procedures herein condemned is the result obtained, that is, the judgment of guilt. Results have never justified improper procedures and this court has not hesitated to reject the results of improper police procedures, *i.e.*, wiretapping cases, search and seizure cases, coerced confession cases, etc. In this area of right to counsel and induced admissions or confessions, the same public policy against surreptitious, "closed door" action by police authority should require rejection of the evidence thus obtained. The Bill of Rights does not leave in the hands of the police the power to decide who has earned the right to be treated as an American citizen and who should be deprived of his right to fair treatment and the due process of law.

5. The *ex parte* interrogation of an accused is not necessary. Generally, the police already have sufficient evidence available to them, the proceeding has become "accusatory" and the purpose of the induced confession or admissions is the convenience of trial. If the evidence they have is in-

> sufficient, it may require additional effort on their part. This is the proper way. Police convenience has never been equated to basic constitutional rights of citizens. As stated in *Escobeda,* "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

If it is true that the presence of counsel is necessary at the time of the hearing in court, and if it is also true that "most confessions are obtained during the period between arrest and indictment", it would follow that the presence of counsel is necessary at every stage of the proceeding against an accused and whether the proceeding is before a Court, a Deputy District Attorney or a police officer. The deliberate attempt on the part of the police officers to avoid the presence of counsel and their obvious effort to take advantage of the time lag between the arrest and the time necessary to obtain an order for the release of the defendant is clearly a denial of defendant's right to counsel as provided in the Sixth Amendment.

A guiding principle should not depend for its efficacy on speed, physical proximity or technical procedures. If advice and presence of counsel is important, it is precisely at the time of interrogation. The subtleties, imagination and talent of an experienced investigator far surpasses the capabilities of a distressed and disturbed layman to protect himself. In Los Angeles, it takes literally hours to obtain an order to release an accused and then that order must be served on the officers holding the accused wherever their station may be.

In these intervening hours, is it to be the principle of constitutional protection of the accused that the police may interrogate without counsel present and use the words of the accused to "hang" him? If that be so, we have an unequal contest weighted against an accused contrary to the principle of constitutional protection stated by this Court in *Escobedo,* 84 S. Ct. at page 17, "Our Constitution . . . . strikes the balance in favor of the right of the accused".

The right to counsel means the right to counsel's presence at every stage of the proceeding. It is respectfully submitted, therefore, that the rule of law to be stated by this court should be: When the prosecution begins to focus on the accused, the prosecution may not secure admissions from the accused in the absence of counsel unless the rights to counsel and to remain silent are found to be clearly, knowingly and intelligently waived.

III.

May a Waiver of Constitutional Rights by Petitioner Be Presumed Without an Express Finding by the Trial Court?

A waiver should not be presumed without compelling evidence indicating that it was clearly, understandingly and intelligently made. In *Escobedo,* this court refused to assume a waiver, despite the fact that petitioner was represented by counsel and had understood that he was "not to say anything". Quite the contrary.

> "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and would not presume acquiescence in the loss of fundamental rights". *Johnson v. Zerbst* (1938), 304 U.S. 458.

In this case, we have a woman of advanced years, with limited education, highly emotional, who had undergone tremendous emotional stress during the previous several days. She was alone in police custody and in an interrogation room confronted by three experienced police officers waiting for her attorney to bail her out. She had no prior experience with police authority and was deliberately being elicited to make incriminating statements by carefully framed questions designed to assure admissibility into evidence of the resulting answer, and all being done in the period of time required by the procedures of the court and the Police Department for counsel to be away in order to obtain her release. There had been no discussion of what petitioner could or should do in the event of an extended interrogation or even what it might be possible for her to do in the face of her emotionally upset condition [R. T. 335]. From such facts, it is submitted, there was no waiver of constitutional rights.

IV.

Should Escobedo Be Given Retrospective Application?

California Penal Code, Section 1237, states that

> "An appeal may be taken by the defendant: 1. From a final judgment of conviction; a sentence or an order granting probation shall be deemed to be a final judgment within the meaning of this section".

In this case, sentence was pronounced on November 12, 1963 [C. T. 12]. Notice of appeal was filed the same day. *Escobedo* was decided June 22, 1964. The first *Dorado* decision, *supra,* was decided in California

August 31, 1964. The questions here presented were submitted to the District Court in petitioner's closing brief on November 17, 1964. It is apparent that an objection in the Trial Court would have been a useless act. Further, the issue was raised directly on appeal at the earliest possible moment and not collaterally, that is, by Petition for Writ of Habeas Corpus. At the time of trial, the definitive ruling on the question of law had not yet crystallized. Therefore, it is contended that the issue was raised in an appropriate and timely manner and may, and should, be considered on this appeal.

The California Supreme Court has recently considered this question. *In re Lopez and Winhoven,* 62 A.C. 380, 42 Cal. Rptr. 188 (January, 1965). This case arose as a Petition for Writ of Habeas Corpus after the California Supreme Court had affirmed the conviction of the defendant in 1963 (60 Cal. 2d 223) and certiorari was denied by this court (*People v. Lopez,* 375 U.S. 994). The court held,

> "Whether or not Lopez' incriminating statements were improperly admitted under either Massiah or under Escobedo and Dorado, we hold that Massiah may not serve as the basis for collateral attack upon judgments which have become final before the date upon which the United States Supreme Court rendered that decision, nor may Escobedo or Dorado be applied to cases which have become final prior to the date that the United States Supreme Court rendered the Escobedo decision."

The court does not appear to distinguish between direct and collateral attack on a final judgment. It recognized and cites a number of cases in which this court

"has applied retroactively on collateral attack its decisions requiring procedural fairness at criminal proceedings". The Court states at page 194 (42 Cal. Rptr.)

> "The Escobedo rule did not, however, emanate from the inherent unreliability of the confessions introduced in the trials of the past or from the uncertainty of the guilt of those who had thus confessed; it emerged from the belief that secret interrogation was the source of coercion, that the opportunity for the presence of counsel would end the secrecy and that the exclusion of the confession obtained without such opportunity would deter those tactics. The court sought to discourage oppressive police practices."

It is true that the decision would tend to discourage oppressive police practices. However, it is also true that a confession obtained under circumstances herein described is of questionable reliability. As this court stated in Escobedo,

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable".

It is a two-headed attack, practical and moral. To refuse a retroactive application of a constitutional right simply because it is newly defined permits undue weight to be given to the fortuities of time, court calendars and the advent of particular cases.

This court has not yet ruled on this issue. It is submitted that the rules enunciated by this court in *Escobedo* could and should be properly applied to the type of situation herein presented.

Conclusion.

The Petition for Writ of Certiorari should be granted and the judgment reversed.

Respectfully submitted,

I. GLOVIN,

Attorney for Petitioner.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

APPENDIX "A."

Opinion of the District Court of Appeal.

[2d Crim. No. 9650. Second Appellate District, Division One. Filed December 10, 1964, J. T. Alley, Clerk.]

The People of the State of California, Plaintiff and Respondent, vs. Lois Betty Boundy, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Allen T. Lynch, Judge.

For Appellant: Irving Glovin, Alvin B. Baranov.

For Respondent: Thomas C. Lynch and Stanley Mosk, Attorneys General; Doris H. Maier, Assistant Attorney General; G. A. Strader, Deputy Attorney General.

This is an appeal from a judgment of conviction of grand theft.

In an information filed in Los Angeles County on August 20, 1963, it was charged that defendant "within a twelve consecutive month period" prior to April 26, 1963, feloniously took $45,000 in money belonging to the Dakota Engineering Company in violation of section 487, subdivision 1, Penal Code. In a jury trial defendant was found guilty of grand theft. A motion for a new trial and probation was denied and defendant sentenced to the state prison. Later the court made an order suspending the execution of the judgment, vacated the order denying probation and placed defendant on probation for a period of five years upon certain conditions, some of which were that defendant spend 180 days in jail and make restitution "as determined by the Court in pending civil case." This appeal followed.

A résumè of some of the facts is as follows: In about 1958, Francis DeBartolo and two other persons organized the Dakota Engineering Company. DeBartolo was the president and a director of the corporation. Appellant worked for the company from that time until her arrest in May, 1963. At first she was a bookkeeper and later, when DeBartolo purchased all of the stock of the corporation, defendant became one of the directors of the company and its treasurer. The third Director after DeBartolo had purchased all the stock was Clair Christensen, the corporation attorney, who also served as the secretary of the company until shortly after appellant's arrest. The entire control of the corporation was with DeBartolo. In February, 1962, DeBartolo suffered an illness (a stroke) and was hos-

pitalized. Between March, 1962 and April, 1963 he had several heart attacks and spent considerable time at home convalescing. It was during this period of time when appellant illegally took the money of the corporation. During this time, Christensen signed the checks for the corporation which were presented to him by appellant, and prior to April of 1962, signed from 15 to 30 checks in blank at the request of appellant.

Corporation checks required any two of the three directors' signatures. The usual practice was for appellant to make out the necessary checks, sign the same herself and then secure the signature of either DeBartolo or Christensen. She was the office manager and performed all of the office work, and generally ran the business and would take and fill orders, receive and deposit checks, and make out checks for disbursements. For her work she received $500 per month plus a Christmas bonus of $100.

DeBartolo noted that in early 1963 there was an abrupt drop off in the business, gross sales having fallen off by 50%. In April, 1963 he requested an accounting firm to make a complete audit for the purposes of ascertaining the cause for the drop in sales and why and where the business was losing money. Edward Juline, a public accountant, who had made financial examinations and reports from the corporation's books since its organization was to conduct a detailed audit, the first to be made since the organization of the corporation. Juline testified in detail, illustrating his examination of the books, accounts and bank accounts with charts and schedules with reference to the shortage which he found in the corporation's accounts and which he traced to appellant's bank account. As an

expert, he expressed the opinion and conclusion that during the period from April 30, 1962 to May, 1963, there was a cash shortage in the corporation books of $48,616.50, and that of said amount, $44,797.82 could be traced to appellant's bank account. Checks in the sum of $3,818.68 remain untraceable and unidentified. Confirmations were made with the bank and customers of the corporation and a physical examination of the cancelled checks, check stubs, invoices, and inventory was made. A bank reconciliation schedule showed the existence of bank deposits made to the corporation's checking account which were not recorded by appellant in the corporation's books. Another schedule traced checks from the corporation's account to deposit tickets and bank statements of the appellant in the same bank. Checks charged to the corporation's bank account during the period of May 1, 1962 to April 30, 1963 but which were never located in the corporation's records were scheduled. It was demonstrated that as of April 30, 1962, the bank statement was reconciled and in balance with the corporation's books. A schedule of appellant's checking and savings accounts for the period of May, 1961 to May, 1962 showed deposits of $11,907.60, and from May, 1962 to May, 1963 there were deposits of $54,824.64.

As of April 30, 1962 the books of the corporation were in order and appellant prior thereto had made an entry in the check record for each check issued by the corporation and all cancelled checks were kept and filed. From April 30, 1962 to May 1, 1963 appellant received money in the form of checks from customers and deposited the same in the corporation's bank account, but did not record the receipt of the money in

the books. The total of such shortages for the year was $48,616.50.

It was Juline's opinion that appellant failed to record sales in the corporation's books in amounts sufficient to offset the amounts deposited in the bank and, similarly not shown on the corporation's books. The corporation's books were in balance, but they could not be reconciled with the bank records.

The accountant identified 36 transactions during the crucial period in which checks were drawn on the banking account of the corporation as shown by the bank records and identical deposits on the same dates were made in the appellant's bank account by deposit of checks in such amounts. None of these 36 checks were recorded in the corporation's books and the checks themselves were never found. In the check record of the corporation, maintained by appellant, there were missing numbers imprinted serially numbered check books as to stubs and the checks themselves. Juline asked appellant about the missing cancelled checks, and she, at one time, stated that she did not know where they were. As heretofore indicated, prior to April, 1962 appellant had retained all cancelled and voided checks.

At the time of appellant's arrest, officer Carpenter recovered from her apartment twelve checkbooks and she stated to the officer "Those are my books." The numbers of checks which were missing from the corporation's books were found noted in appellant's personal check record with respect to amounts which corresponded to checks charged against the corporation's bank account and deposits to appellant's account. Juline stated that it was his opinion that checks drawn on

the corporation's account appeared and were deposited in the appellant's bank account.

In a talk with Juline, Christensen and Art Peterson on May 20, 1963 the appellant first stated that the missing checks were in a box which she stated she had given to Juline. When informed the checks were not there, she then said that she had destroyed them. On the next day she was told of the amount of the shortage and she asked that Juline not tell DeBartolo. She attempted to borrow money from the bank and from the accountant in order to repay the amount of the shortage. She refused to explain the deposits to her bank account and said the money "came from somebody else" or that it was "confidential." On the next day she did raise some money and turned it over to the accountant. When she was placed under arrest at her apartment and told of the grand theft charge she said "you won't give me a chance to pay it back," stating, further, that she had already paid some and would pay back another $30,000. A search of the apartment resulted in the finding of 12 checkbooks (heretofore mentioned) under the bed. She made an effort to push the box further under the bed when one of the officers picked it up. She apparently was given an opportunity to, and did, telephone to her attorney from her apartment. She was then taken to jail.

In an interview at the police station, her talk was recorded on tape. The tape was introduced into evidence. She, at that time, explained that she sometimes got drunk and would get things mixed up and place deposits in her bank account which belonged to the corporation, that she had paid back $12,000 and would pay back another $30,000 the next day, that the missing

checks from the serially numbered checkbook of the corporation was due to an error by the printer. That explanation conflicted with her other statements to the effect that she had destroyed the missing checks. Some of the questions and answers on the tape recording are set forth in the footnote.[1]

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[1]"Q. Well, over the period of time, it's my understanding that there is about, in the neighborhood of $50,000 fouled up.

"A. They say that, but I can't figure it out and I can't see the books and they won't show the figures to me and won't show me where I made my mistake and let me see anything.

"Q. Well, let's go to what you said yourself, and see if we can understand this part of it and then maybe a reason for that. When you were first arrested at the apartment you said — I know I owe them $30,000 —

"A. That is what they said.

"Q. You said this yourself. You said you owed them about $30,000; that it was going to be 'straightened out tomorrow.'

"A. Yes, that is what they say and I was going to get it tomorrow. I had an appointment with the attorney tomorrow afternoon and made special arrangements with my girl friend to drive me over because he's way over there and I'm here, the cab fare is no cheap fare.

"Q. Well, were you going to come up with $30,000 tomorrow to pay them back? I don't know, I have to ask.

"A. Now let me ask you this. What is the point of telling you fellows all about this? Because now I'm not in a position to be talking to you. My attorney advised me not to talk to you but I have been kind enough to tell you the story to give an idea what Frank is.

"Q. We're trying to understand it. We appreciate you talking to us.

"A. How far is this going and where is it going?

"Q. Well, we have to understand it to be able to —

"A. But who are you going to be talking to afterwards?

"Q. This whole thing is going to be submitted to the District Attorney's office.

". . .

"Q. This $12,000 that you paid back, where did you get this money? Is this money that you had gotten through your mess-up in handling the books?

A. I got it from friends.

Q. You got that money from friends? This wasn't anything to do with the mess-up in the books?

"A. No, I got it from friends, who came to my rescue, but they can't give me any more, they gave me what they could.

At the trial, appellant admitted that she had falsified the corporation's books and that the monies amounting to about $48,000 were deposited in her own account, but that the money was a gift to her from DeBartolo and that she had been requested by DeBartolo to deposit the money in her account for the purposes of saving on

---

Eventually, I'll pay them back, they know I will, no matter how long it takes. I have a few friends.

"Q. How about the $30,000, now what were you planning on doing?

"A. All I know is that I'm going to sell my apartment, that is all I can do.

"Q. The apartment you are living now?

"A. Yes.

"Q. I thought that belonged to Frank?

"A. The apartment may but not the rest.

"Q. The stuff inside belongs to you?

"A. If he steps in and takes anything, then look out.

"Q. Your door is locked up there.

"A. I know one thing he is dying to get his hands on —"

During the questioning at the jail, one of the officers stated to appellant that he wanted to see if her attorney had called at the jail as yet. He ascertained that her attorney had not arrived and said to her:

"Q. Your attorney hasn't called or come in yet, so evidently he's still working on it. He's got to get a paper, signed by a commissioner or a judge."

Finally, the tape records the following:

"Q. Well, your attorney's here and we've got to do a couple more things and see if he can get you out of here. Just one question I want to ask you.

"A. Go ahead and ask it.

"Q. Nobody has mistreated you here?

"A. You haven't mistreated me. It's just that you blackened my record now by bringing me here. Now, what is this going to do with my credit accounts? Now, I have a high standing in my credit accounts.

"Q. When this is all finished and squared away, why your attorney can help you straighten out.

"A. Well, I have got a record now. Can you erase that? That's what I am going to hold against you.

"DETECTIVE CHIABAUDO: Well, you've got to look at it this way. That's our job.

"Q. Let's go out and see what your attorney has to say here."

corporation income taxes. DeBartolo stated that he did not authorize the falsification of the books and that he made no gift to appellant other than the $100 Christmas bonus.

Appellant now asserts that (1) the evidence is insufficient to establish all of the elements of theft by embezzlement, (2) the court erred in restricting appellant's cross-examination of DeBartolo and Juline, (3) the court erred in admitting her statements without sufficient proof of the corpus delicti, (4) the court erred in giving and refusing certain instructions and the prosecutor was guilty of prejudicial misconduct in misstating the evidence to the jury. She further asserts that under the ruling in *Escobedo v. Illinois*, 12 L. 2d 977, 84 S. Crt. 1758, and *People v. Dorado* (California) she should not have been examined by the police and the tape recording of her statements at the police station were not admissible in evidence.

It is permissible simply to charge grand theft as was done in this case. See 1 Witkin, California Crimes, section 366, page 342, where it is stated "the prosecution is not required to elect the particular kind of theft which it will attempt to prove" and "no longer need the legal profession puzzle over fine distinctions between embezzlement, larceny and other elements of stealing. The crime is complete if a man takes property not his own, with intent to take it." and further that, " 'it is immaterial whether or not they [the jury] agreed as to the technical pigeonhole into which the theft fell.' [Citations.]"

The particular case does not necessarily have to fit into one category to the exclusion of others.

In this case, appellant undoubtedly knows just what method and procedure she used and she probably also knows what happened to the missing checks. The fact that the checks have never been found, however, is not fatal to the prosecution. Appellant gave different versions of what occurred and the jury could have believed part or none of her stories. It may have been that appellant used the checks signed in blank by Christensen, or the endorsement of the name of the payee may have been forged by appellant followed by her endorsement — the checks may have been made out to her and such fact kept from the co-signer which went undetected by the bank. The exact method she used to steal from the corporation and DeBartolo is not all-important. The important thing is, did she steal about $48,000 during the time in question? She was a $500-per-month bookkeeper and officer-manager and deposited about $48,000 into her own account during the time in question. DeBartolo made no gift to her (excepting the $100 Christmas bonus), the corporation's books were falsified by her during the year by shorting sales and failing to record some $48,000 in checks drawn on the corporation's bank account and the deposits to her account were traced to the unrecorded checks and missing check numbers which she had noted in her personal check records.

Up to the time of trial, when she said there was a gift of the money, the evidence is clear that there was no mistake and no gift. There had been without question unauthorized transfers of the corporation's money into her hands. The corpus delicti was established when it was shown that the money was missing and no one was given permission to take it. (*People v. Brooks*,

154 Cal. App. 2d 631; *People v. Johnson,* 153 Cal. App. 2d 870; *People v. Theodore,* 174 Cal. App. 2d 237.)

There was without question a relationship of trust and confidence imposed in appellant by DeBartolo, she had substantial control of the funds of the corporation, she evidenced a fraudulent appropriation of the money and her intent and actions are clear. It is not required that the actual money be in the actual possession of the embezzler. "It is sufficient to show that while an accused was not in actual possession of the money it was under his control in the sense that it was under his direction and management. . . ." (*People v. Hess,* 104 Cal. App. 2d 642, 672. See also *People v. Holtzendorf,* 177 Cal. App. 2d 788; *People v. Forman,* 67 Cal. App. 693; *People v. Swanson,* 183 Cal. App. 2d 424; *People v. Coggan,* 155 Cal. App. 2d 42.)

Her contradictory statements indicate a consciousness of guilt and an attempt at times to conceal her crime. She was uncooperative during the audit, she, in effect, admitted her guilt to the police by returning $12,000 and suggesting the securing of $30,000 more to further repay the obligation. People who are honest and innocent do not pay over $12,000 forthwith and suggest the payment of another $30,000 to be made the day following to an employer who finds a shortage of $48,000 in his company records.

There was no improper restriction of appellant's cross-examination of DeBartolo. She attempted to show a close relationship between herself and DeBartolo and that, as a consequence thereof, he had made a gift to her of the money in question. He testified on cross-examination that the relationship was not a close per-

sonal relationship. She attempted then to introduce a statement made by DeBartolo in a deposition in a civil suit. The statement is not in the record, but apparently DeBartolo said: "Well, if she has friends, I will ask this question. Why did she stick to me like a mustard plaster for six solid years, and I couldn't go any place but what she wouldn't tag along, and I know because I spent most of my time with her and she never went to see any friends." DeBartolo had previously testified that she had accompanied him on trips and they were together a considerable part of the time, that he took her out to dinner — in other words, there was no denial that their association was frequent, but he did deny that there was any close personal relationship.

Any statement offered for impeachment purposes must be clearly inconsistent with or contradictory to the prior testimony of the witness. (See Witkin, California Evidence, §664, p. 702-703, and cases cited; *People v. Atchley*, 53 Cal. 2d 160.)

We think the statement was not contradictory nor inconsistent with the previous testimony, but even if it was, the error was not prejudicial under the facts of this case.

There was no error in refusing to admit into evidence matters relating to DeBartolo's tax liability. The court did permit the appellant to go into the fact that the decrease in the amount of sales shown on the books of the corporation would reduce the amount of the income tax of the corporation to that extent since there would be a reduction of that income. The court did refuse, however, to bring out the exact amounts by which the corporation's income tax would be affected. There was no prejudicial error in this, and appellant had cited

this court to no authority holding that is prejudicial error. Furthermore, there was no showing made as to the relevancy of the evidence under the circumstances.

Appellant requested an instruction.[2] She now contends that it was error for the court to refuse to give such instruction. A reading of the proposed instruction demonstrates that it is faulty and should not have been given under the circumstances. Among other things, it assumes facts not in evidence. (*People v. Jones,* 184 Cal. App. 2d 464; *People v. Best,* 172 Cal. App. 2d 692; *People v. Darnell,* 107 Cal. App. 2d 541; *People v. Garcia,* 124 Cal. App. 2d 822; *People v. Hill,* 76 Cal. App. 2d 330.)

Appellant further argues, relative to the prosecutor's misconduct, that in his opening statement the prosecutor said that the defendant was entrusted with the funds of the corporation when, in fact, the defendant was not so entrusted with such funds because it took two signatures before a check could be cashed. The statement was not improper under the circumstances for it was not necessary for the defendant to have the exclusive control of the funds before she could be guilty of theft and she had enough control that she made away with about $48,000 of the corporation's money. The prosecutor speculated in his argument as to how the appellant probably obtained the money from the corporation. The checks were never found and all the

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[2]"If you find that the checks deposited into the defendant's bank account were the checks of Dakota Engineering, Inc., and if you find that the checks were made payable to defendant, and if you find that the checks were signed by any authorized signatories of the corporation, then you are instructed that the defendant received the checks with authority and was legally in possession thereof and legally entitled to the proceeds, and that no crime was committed at all."

prosecutor did was to mention several of different ways by which the appellant could have gotten the corporation's money into her account. He was simply presenting to the jury legitimate inferences which could properly be drawn from the evidence. (See Witkin, California Criminal Procedure, §444, p. 446, and cases cited.)

In *Escobedo, supra,* 12 L. ed. 2d 977, 979, the court said: "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright, 372* U.S. 335, 342, 9 L. ed. 2d 799, 804, 83 S. Ct. 792, 93 A. L. R. 2d 733, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation."

In the cited case the defendant asked to talk to his attorney before being required to make any statement. The attorney tried to talk with defendant before he made any statement. The police in *Escobedo* told him that his attorney did not want to talk with him which was an untruth and "notwithstanding repeated requests by each, petitioner [Escobedo] and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation." The court further said in *Escobedo* (p. 986): "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interroga-

tions that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 US, at 342, 9 L ed 2d at 804, 93 ALR2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

A fair reading of the transcript in the case at hand indicates that the facts of this case and the facts in Escobedo are in nowise similar. No useful purpose would be served in extending this opinion and pointing out the multitude of differences.

The appellant was found guilty upon substantial evidence. There is no reversible error in the record.

The attempted appeal from the sentence, the verdict and the order denying a motion for a new trial are, and each is, dismissed.

The judgment is affirmed.

Fourt, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

Certified for non-publication in Official Reports under Rule 976.

Wood, *P. J.*

Fourt, *J.*

Lillie, *J.*

Clerk's Office, Supreme Court.
4250 State Building

San Francisco, California 94102
February 3, 1965

Hearing Denied

In re: 2nd Criminal No. 9650. People v. Boundy.

Respectfully

William I. Sullivan
Clerk